No. 84-1479

In the

SUPREME COURT OF THE UNITED STATES

October Term 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

-against-

JOSEPH ALLAN WILSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Respondent respectfully submits that, should the Court grant a writ of certiorari in this case, the issues presented for review would be:

1. Were the incriminating statements obtained from Wilson by a secret government informant under circumstances identical to those that were determinative in United States v. Henry, 477 U.S. 264 (1980), "deliberately elicited" by the government under the test of United States v. Henry? The Court of Appeals answered this question in the affirmative.

2. In view of the clear violation of Wilson's Sixth Amendment right to counsel under the holding of Henry, was a full review of the merits of Wilson's habeas corpus petition required by the ends of justice? The Court of Appeals answered this question in the affirmative.

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Respondent respectfully submits that the Court should not issue a writ of certiorari in this case because there is no special and important reason for review of the decision of the Court of Appeals for the Second Circuit.

Opinions Below

To the description of the opinions below provided by petitioner, respondent adds the following:

The opinion of the Court of Appeals for the Second Circuit, Wilson v. Henderson, is reported at 742 F.2d 741 (2d Cir. 1984).

The proceedings on Wilson's initial application for a writ of habeas corpus in the United States District Court for the Southern District of New York and in the Court of Appeals for the Second Circuit did not present "precisely the same factual and legal issue" as that raised in Wilson's current application because at the time of the former proceedings, this Court had not yet decided United States v. Henry, 447 U.S. 264 (1980).

This Court denied Wilson's petition for a writ of certiorari in the earlier proceeding, 442 U.S. 945 (1979) because it was untimely.

Constitutional and Statutory Provisions

In addition to the Constitutional and statutory provisions that petitioner cites, the following statutory provisions are applicable:

1. United States Code, Title 28, United States Supreme Court Rule 17.1, which provides in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> a. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
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>
> c. When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. United States Code, Title 28, section 2253, which provides in pertinent part:

> In a habeas corpus proceeding before a circuit or district judge, the final order

shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

STATEMENT OF THE CASE

In reversing the District Court and granting Wilson's application for a writ of habeas corpus, the Court of Appeals emphasized that under this Court's holding in United States v. Henry, Wilson's conviction had been procured in a manner that violated his Sixth Amendment rights. Wilson v. Henderson, supra, 742 F.2d at 748. The facts as to the state's use of a surreptitious informant to obtain incriminating statements from Wilson after he had been arraigned in the absence of his counsel and the steps Wilson took in his effort to overturn his conviction are not in dispute. Petitioner takes issue exclusively with Wilson's right, after his conviction had become final and the federal courts had denied his first habeas corpus petition, to renew his request for relief on the ground that the decision in United States v. Henry has clarified the proper standard for determining whether his Sixth Amendment rights were violated. In this case, however, the Court of Appeals properly determined that the ends of justice required review of the merits of Wilson's second petition. Having done so, it properly exercised its duty to conduct such a review and correctly decided that Wilson's conviction should be overturned.

A. The Robbery, Wilson's Arrest, and His Arraignment.

On July 4, 1970, an armed robbery of the Star Taxicab Garage was committed during which the on-duty dispatcher was shot and killed. Witnesses identified Wilson, a former Star employee whose brother was still employed there, as being present on the Star premises at about the time of the robbery. Aware that the police were looking for him, Wilson

voluntarily surrendered himself on July 8 and was promptly arrested. After receiving his Miranda warnings, he admitted to Detective Cullen that, while looking for his brother, he came upon the scene of the crime and witnessed the robbery. Wilson told Cullen that he had not participated in the robbery, but fled because he was afraid of being blamed. Counsel was subsequently assigned to him and he was arraigned on July 9, 1970. Wilson was then placed in the Bronx House of Detention.

B. The State's Enlistment and Use of a Secret Informant.

On July 7, 1970, the day before Wilson's arrest, Detective Cullen met with one Benny Lee, an inmate of the Bronx House of Detention whom Cullen had known for five years and previously used as an informant. He told Lee that he was investigating a murder and robbery, showed Lee a photograph of Wilson, and said that he was fairly certain that he would arrest Wilson as a suspect within the next twenty-four hours. Detective Cullen asked Lee whether he knew Wilson and whether there was anything that Lee could do to help him with the case. Lee said that he had "seen him around" but did not know Wilson very well. Cullen then told Lee that, after arresting Wilson, he would have him transferred to Lee's cell in the Bronx House of Detention. Cullen asked Lee to "see if [he] could find out" from Wilson the names of the two perpetrators who had escaped identification.

Lee, who was then a third-time offender awaiting sentencing on a plea of guilty to a reduced charged of robbery in the third degree, had, by his own testimony, previously served as a police informant over 100 times. At Wilson's trial, defense counsel questioned Lee as to whether he received consideration for informing on Wilson, but failed to elicit a comprehensible answer. However, it is certain from Lee's

testimony that he was frequently paid for his services as an informant.

In accordance with the arrangement between Cullen and Lee, Wilson was transferred to Lee's cell in the Bronx House of Detention, which overlooked the Star Taxicab Garage, the scene of the crime.

C. Events Following Wilson's Transfer to Lee's Cell.

Immediately upon entering the cell, Wilson was upset by the view. His first words to Lee were, "Somebody's messing with me because this is the place that I'm accused of robbing." Wilson told Lee that on the night of July 4, he had gone to the Star Garage to see his brother who worked there. Two men approached him near the front door. He directed them to the soda machine inside the garage and then walked inside himself, talked to some people, and bought a soda. Subsequently, he heard two shots and saw the two men* running out of the dispatcher's office stuffing money into their clothes, dropping some of it. Wilson said that he then picked up some of the money and followed the men out of the garage and up the street.

Lee told Wilson, "Look, you better come up with a better story than that because that one doesn't sound too cool to me." Over the next few days, Lee and Wilson "talked about different people in the street" and, according to Lee, Wilson gradually altered the description of events that he had first given. Wilson also received a visit from his brother, who told him that his family was agitated by the shooting. According to Lee, Wilson eventually claimed to have planned and executed the robbery with the two unidentified men.

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* Other witnesses also saw the two men and described them to the police but were unable to identify them. These two individuals were never apprehended.

Wilson and Lee spent about nine or ten days together in the cell overlooking the Star Taxicab Garage. On July 24, 1970, Detective Cullen had another meeting with Lee at the Bronx House of Detention. Lee told Cullen that Wilson had admitted to the planning and execution of the robbery. At this meeting, Lee turned over pages on which he had made notations of "things that [he] thought would be of help to Detective Cullen." Later that year, Lee obtained the $10,000 bail that had been set in his case and was freed pending his sentencing hearing.

Wilson, who was subsequently indicted and charged with murder and felonious possession of a weapon, moved to suppress Lee's testimony at his trial. A pretrial hearing was held pursuant to People v. Huntley, 15 N.Y.2d 72 (1965). The trial court denied Wilson's motion on the grounds that Lee had not "interrogated" Wilson. Consequently, Lee's account of his conversations with Wilson and Lee's notes were admitted into evidence in the State's case against Wilson. Wilson was convicted for both crimes and his direct appeals to the higher courts of the State of New York were futile.

D. Wilson's Initial Application for a Writ of Habeas Corpus.

After his journey through the courts of the State of New York, Wilson filed an application for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming, inter alia, that the admission of Lee's statements violated his Sixth Amendment right to counsel. Relying on an erroneous interpretation of Massiah v. United States, 377 U.S. 201 (1964), under which the state trial court's finding of "no interrogation" of Wilson controlled the determination of whether his incriminating statements to Lee were deliberately elicited by the government, the District Court, Carter, J., rejected this claim.

On appeal, the District Court's denial of habeas corpus was affirmed by the two-to-one vote of a panel of the Court of Appeals for the Second Circuit. District Judges Blumenfeld and Mehrtens (both sitting by designation) voted to affirm the District Court's decision and to deny rehearing, while Circuit Judge Oakes voted to reverse. Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978). A divided court denied rehearing en banc with Circuit Judges Mansfield, Oakes, and Gurfein voting to reconsider whether the District Court's holding with respect to Wilson's Sixth Amendment claim should be reversed. Wilson v. Henderson, 590 F.2d 408 (2d Cir. 1979). In his dissent from the denial of rehearing en banc, Circuit Judge Oakes noted that, with respect to Wilson's Sixth Amendment claim, a majority of the panel of the Fourth Circuit had recently held "directly contrary" to the majority of the panel of the Second Circuit in a case entitled Henry v. United States, 590 F.2d 544 (4th Cir. 1978). 590 F.2d at 409 (Oakes, J., dissenting).

Wilson's petition for certiorari to this Court was denied without opinion because it was untimely. Wilson v. Henderson, 442 U.S. 945 (1979).

E. Wilson's Current Application for a Writ of Habeas Corpus.

Less than four months after this Court denied certiorari in Wilson's case, it granted certiorari in United States v. Henry, 444 U.S. 824 (1979).* This Court subsequently affirmed the decision of the Court of Appeals for the Fourth Circuit, which held that the government's evidentiary use of incriminating statements obtained from an indicted, in-custody defendant by his fellow inmate, a secret government informant,

* This Court denied Wilson's petition for certiorari on June 18, 1979 and granted certiorari in Henry on October 1, 1979.

violated the accused's Sixth Amendment right to counsel. United States v. Henry, 447 U.S. 264 (1980).

In Henry, this Court expressly rejected the government's contention that a finding of interrogation or equivalent verbal conduct by the government or its agent was a necessary element of a violation of the accused's Sixth Amendment right to counsel under its sixteen-year-old decision in Massiah v. United States, 377 U.S. 201 (1964). See Henry, 447 U.S. at 271. That issue had been raised by certain language ("tantamount to interrogation") in the Court's decision in Brewer v. Williams, 430 U.S. 387, 399 (1977) and had remained unresolved prior to the Court's decision in Henry. Compare Henry, 590 F.2d at 546-547 (Winter, C.J.) with Henry, 590 F.2d at 548-550 (Russel, C.J., dissenting).

Attorneys for Wilson took note of this Court's Henry decision, and commenced proceedings in the courts of the State of New York in an unsuccessful effort to obtain relief. All state court remedies were exhausted.*

On July 6, 1982, Wilson again petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus on the ground that his Sixth Amendment right to counsel had been violated under the test promulgated by this Court in Henry and that all relevant considerations militated for the application of the Henry rule to his case. The District Court, Gagliardi, J., denied Wilson's petition by

* On September 11, 1981, Wilson made a motion in the Supreme Court of the State of New York, Bronx County, to vacate his conviction pursuant to section 440.10 of the New York Criminal Procedure Law (the State's habeas corpus statute) on the ground that this Court's recent decision in Henry established that his conviction had been obtained in violation of his Sixth Amendment right to counsel. The motion was denied by order dated November 20, 1981. Wilson's motion in the Appellate Division of the Supreme Court, First Department, for leave to appeal the November 1981 order was denied on January 19, 1982.

opinion and order dated March 30, 1983. (Petitioner's Brief, Appendix C.)

The District Court interpreted Henry as requiring evidence of "an affirmative effort on the part of [the informant] to elicit" incriminating statements from the accused. It noted its agreement with that part of Justice Powell's concurring opinion in Henry, 447 U.S. at 276, in which he interpreted the majority's holding to require that "the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant." The District Court distinguished Wilson from Henry, noting that Lee had not made an "affirmative effort" to question Wilson. Because of its holding that Wilson's case was distinguishable from Henry, the District Court did not rule on the "retroactivity" issue of whether the holding of Henry should be applied in this case.

The Court of Appeals for the Second Circuit reversed. Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984). It rejected the State's argument that principles of finality should be determinative of Wilson's application, and went on to consider his application for habeas corpus because the ends of justice required it. 742 F.2d at 743. It analyzed Henry and Wilson, and concluded that they are indistinguishable. 742 F.2d at 745. This conclusion is not a new one, but one that had previously been reached by two Justices of this Court and judges of three Courts of Appeals. United States v. Henry, 447 U.S. at 281 (Blackmun and White, JJ., dissenting); Henry v. United States, 590 F.2d 544, 553 (4th Cir. 1978) (Russel, J., dissenting); Wilson v. Henderson, 590 F.2d 408, 409 (2d Cir. 1979) (Oakes, J., dissenting); and United States v. Sampol, 636 F.2d 621, 637-638 (D.C. Cir. 1980) (per curiam). The Court of Appeals held that, under Henry, the government had deliberately elicited incriminating statements from Wilson in violation of his Sixth Amendment right to counsel. 742 F.2d at 745.

The Court of Appeals also held, with respect to the issue of the retroactivity of Henry, that it established no new rule of law so that it is automatically applicable to prior cases. 742 F.2d at 747. Recognizing that Henry is fully applicable to Wilson, the Court held that Wilson's conviction on the basis of incriminating statements elicited by the government through a secret jailhouse informant necessarily contravened his Sixth Amendment right to counsel, 742 F.2d at 748, and ordered that Wilson be released from custody unless the State elects to try him anew.

Summary of the Argument

United States Supreme Court Rule 17.1 provides, without limiting the Court's discretion, that a writ of certiorari will be granted "only when there are special and important reasons therefor." Wilson respectfully submits that there is no such significant reason for this Court to review the decision of the Court of Appeals. Petitioner's arguments in support of granting the writ amount to nothing more than an expression of dissatisfaction with the outcome below.

Petitioner proposes that this Court review this case in order to amplify its decision in Henry. In Part I below, Wilson submits that the Court of Appeals correctly interpreted Henry and applied Henry to it the facts of Wilson. The decision below leaves no room for ambiguity as to the limits imposed by the Sixth Amendment on the State's use of secret informers against arraigned or indicted prisoners.

Petitioner also proposes that this Court grant a writ of certiorari so that, through this case, it can curtail the power of the lower federal courts to grant full review on the merits to a habeas corpus petitioner whose conviction, the constitutionality of which is in question, has survived one round of collateral attack. In Part II below, Wilson submits that this Court and Congress have determined that the federal courts have broad discretion to review successive petitions for a writ of habeas corpus, that these courts have a duty to conduct such review when the ends of justice require it, and that the Court of Appeals correctly carried out this duty.

ARGUMENT

THE COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

The gravamen of Wilson's habeas corpus application is that he was convicted in a manner that today we recognize as repugnant to the Constitution. The Court of Appeals, in reversing the District Court, acknowledged that Wilson could not now be constitutionally convicted on the basis of Lee's testimony. Petitioner argues that the Court of Appeals should be stripped of the power to revisit decisions of its own and to review those of the lower courts, all of which were handed down before this Court definitively passed on the pivotal question raised in those earlier proceedings. In light of this Court's Henry decision, it is now apparent that those earlier courts erred. Wilson's plea is that those errors now be set right and the law, as we currently understand it, be applied even-handedly to him.

Petitioner asks this Court to review many fragmentary issues concerning the context and manner in which Wilson attacked his conviction. Wilson replies that the Court of Appeals had the power to, and did, review his conviction in light of Henry. Moreover, the Court of Appeals decided correctly.

I. The Decision of the Court of Appeals Is in Harmony with the Precedents of This Court.

This Court's opinion in United States v. Henry, 447 U.S. 264 (1980), identified the circumstances under which it violates the accused's Sixth Amendment right to counsel for the government to procure incriminating statements from him through the use of a secret informant:

> Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

447 U.S. at 270. The presence of these three factors led the Court to hold: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." 477 U.S. at 274.

Until this Court's decision in Henry, Massiah was the primary precedent available to the trial and appellate courts that examined the validity of the police methods used in Wilson's case. In Massiah, this Court held that incriminating statements deliberately elicited from the accused by government agents in the absence of his counsel and recorded by means of a radio transmitter secretly installed in the accused's automobile were obtained in violation of his Sixth Amendment rights. Because the facts of Massiah were markedly different from those of Henry or Wilson, confusion existed as to which aspects of the process of "deliberate elicitation" were determinative.

Until the instant decision of the Court of Appeals in Wilson's case, the courts interpreting Massiah and attempting to apply it to the facts of Wilson uniformly focused on the lack of any direct "interrogation" of Wilson by Lee. See Wilson v. Henderson (unreported decision of Carter, J., attached as Appendix D to Petitioner's Brief) (S.D.N.Y. 1977) pp. 32a-33a; Wilson v. Henderson, 584 F.2d 1185, 1190 (2d Cir. 1978); Wilson v. Henderson (unreported decision of Gagliardi, J., attached as Appendix C to Petitioner's Brief) (S.D.N.Y. 1983) pp. 28a-29a. In this, they were led astray by language in Brewer v. Williams, 430 U.S. 387 (1977), characterizing the investigating detective's conversation with the accused as "tantamount to interrogation." 430 U.S. at 399 n.6. However, it is now clear that Brewer does not limit Massiah, but reiterates in a different context the rule that a

government agent may not deliberately elicit incriminating information from the accused in the absence of his attorney when the right to have an attorney present has attached.*

The District Court, in reviewing Wilson's conviction pursuant to his current application for habeas corpus, erred because it searched the record for evidence that Lee "affirmatively secured the incriminating evidence from the accused," rather than whether the government had created a situation in which the accused was likely to make such statements to the informant. The District Court concluded, "Since the record plainly establishes that Lee's actions did not constitute surreptitious interrogation of the petitioner, the admission into evidence of petitioner's incriminating statements did not abridge his Sixth Amendment right to counsel." (Petitioner's Brief, Appendix C, p. 29a.)

In reversing that decision, the Court of Appeals made clear that the appropriate inquiry under Henry as to an arraigned, in-custody defendant is to determine whether "the government intentionally staged the scene that induced [the accused] to make the inculpatory statements" to the secret informant. 742 F. 2d at 745. The Court of Appeals undertook that analysis and decided that the very circumstances this Court considered determinative in Henry were present here. 742 F.2d at 745. The Court of Appeals has the power to review issues such as these on appeal from the District Court. 28 U.S.C. § 2253. Thus, the decision of the Court of Appeals, being indisputably in harmony with Henry and Massiah, leaves in its wake no special or important reason for this Court to

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* In Brewer, this Court noted that the government agent "deliberately and designedly set out to elicit information from Williams just assuredly as -- and perhaps more effectively than -- if he had formally interrogated him," 430 U.S. at 399, and held such a tactic to be unconstitutional.

review it under the standard set forth in Rule 17.1 of this Court.

II. The Court of Appeals Properly Conducted a Review of the Merits of Wilson's Application for Habeas Corpus as Required by the Ends of Justice.

Petitioner urges this Court to grant certiorari in this case to take the opportunity judicially to rewrite 28 U.S.C. § 2244. (Petitioner's Brief at 14.) The standard that petitioner asks this Court to adopt would preclude review of successive habeas corpus petitions unless the federal court could satisfy a burdensome test grafted onto the standard of Sanders v. United States, 373 U.S. 1 (1968). (Petitioner's Brief at 17.) According to petitioner, such a rewriting would serve to reaffirm the presumption of correctness accorded to state trial court findings of fact under 28 U.S.C. § 2254(d). (Petitioner's Brief at 12-13.)

Contrary to petitioner's contentions, however, Wilson neither subverts the principles underlying 28 U.S.C §§ 2244(b) and 2254(d), nor does it reveal a "critical void" in the statutory framework governing successive collateral attacks on final convictions. The decision of the Court of Appeals granting Wilson's habeas corpus application was an appropriate exercise of its duty to review that narrow subset of successive applications where the ends of justice warrant it. In conducting its review, the Court of Appeals did not in any way denigrate the role of 28 U.S.C. § 2244(b), which provides for summary dismissal of nonmeritorious, or repetitious, successive petitions; rather it reinforced the distinction between abusive successive petitions and meritorious successive petitions, such as Wilson's, which § 2244(b) was intended to preserve.

Further, in reviewing Wilson's petition, the Court of Appeals correctly perceived the scope of the presumption of

correctness accorded state trial court findings of fact under 28 U.S.C. § 2254(d). By independently weighing the state court's factual findings and reaching its own conclusions as to the legal significance of those facts, the Court of Appeals properly exercised its authority to determine mixed questions of law and fact while leaving undisturbed the basic factual findings of the state trial court.

A. The Court of Appeals Correctly Determined That Review of Wilson's Application Was Required to Serve the Ends of Justice.

In Sanders v. United States, 373 U.S. 1 (1963), this Court articulated the parameters of the federal courts' discretionary power to dismiss successive habeas corpus petitions under the provisions of former 28 U.S.C. § 2244, predecessor of the current 28 U.S.C. §§ 2244(a) and 2244(b):

> [E]ven with respect to successive applications on which hearings may be denied because the ground asserted was previously heard and decided . . . § 2244 . . . does not enact a rigid rule. The judge is permitted, not compelled, to decline to entertain such an application, and then only if he "is satisfied that the ends of justice will not be served" by inquiring into the merits.

373 U.S. at 12 (emphasis added). By requiring that the lower federal courts accord full review on the merits to those successive petitions that present compelling circumstances for habeas corpus relief, Sanders reaffirmed the basic principle underlying the writ of habeas corpus that the vindication of Constitutional rights takes precedence over considerations of judicial economy and finality. 373 U.S. at 7-8.

As its legislative history makes clear, the present 28 U.S.C. § 2244(b) was enacted to "alleviate the unnecessary burden" resulting from "state prisoners filing [habeas corpus] applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they

filed the preceding application" while nonetheless "safeguard[ing] the substantial rights of the applicant for the writ." S. Rep. No. 1797, 89th Cong., 2nd Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3663-3672. Accordingly, 28 U.S.C. § 2244(b) was not intended to tip the scales in favor of judicial economy and finality of state court convictions over substantial rights or even to place these competing considerations on an equal footing. Rather, it was designed to equip the federal courts with the means to deal summarily with certain blatant abuses of the habeas corpus process while leaving intact the principle announced in Sanders that the federal courts have a duty to conduct a full review of a successive habeas corpus petition if the ends of justice would be served thereby. 373 U.S. at 18-19.

The legislative history of Rule 9(b) of the Rules Governing Cases and Proceedings under 28 U.S.C. § 2254, enacted ten years after 28 U.S.C. § 2244(b), confirms the Sanders principle. After noting that, "[a]s promulgated by the Supreme Court, [Rule 9(b)] permitted a judge to dismiss a petitioner's second or successive petition, even if the petition alleged new and different grounds for relief, if the judge found that the failure to assert those grounds in a prior petition was 'not excusable,'" the House Committee on the Judiciary noted that:

> The legislation amends Rule 9(b) . . . by deleting the "not excusable" standard. . . . The Committee believes that the "not excusable" language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition. The "abuse of writ" standard brings Rule 9(b) into conformity with existing law. As the Supreme Court has noted in reference to successive § 2255 motions based upon a new ground or a ground not previously decided on the merits, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading."

H.R. Rep. No. 1471, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 2478-2482 (citing Sanders v. United States, supra, and 28 U.S.C. § 2244(b), supra) (emphasis added).

In deciding not to give controlling weight to the denial of Wilson's previous petition pursuant to 28 U.S.C. § 2244(b) and Rule 9(b) on the ground that a full review of the merits of Wilson's petition was required to serve the ends of justice, the Court of Appeals carried out this Court's mandate in Sanders, which has guided more than two decades of lower federal court decisions and survived two occasions of legislative revision. The decision of the Court of Appeals to conduct a full review of Wilson's application for habeas corpus was based on its recognition that no previous court petitioned by Wilson had properly applied Henry's "deliberately elicited" test to the facts of Wilson's case:

> [W]e hasten to point out that the courts considering this matter earlier did not have the benefit of the Henry decision as we now do. Without it, the prior panel relying on Brewer v. Williams, 430 U.S. 387 (1977), concluded that the "deliberate elicitation" standard required evidence of "interrogation" as a prerequisite. Since the state trial judge found that there had been no "interrogation" of Wilson by his cellmate, the panel concluded that this negated the proposition that Wilson's statements were deliberately elicited . . . . The earlier panel also found no distinction between incriminating statements voluntarily made by a defendant to a known government officer and statements made to an undercover agent acting surreptitiously . . . . Henry substantially distinguished these two situations.

742 F.2d at 747. In Sanders, this Court pointed out that:

> Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground . . . . If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application . . . . [T]he foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized.

373 U.S. at 16-17 (citation omitted). While the Court of Appeals did not regard Henry as a change in the law, it

recognized that in light of Henry's clarification of Massiah's "deliberately elicited" test, the review conducted on the merits of Wilson's Massiah claim in his first petition was seriously deficient. Its decision to grant full review of the merits of Wilson's petition on this ground is consistent not only with Sanders but with the long-standing practice in the lower courts with respect to the consideration of successive habeas corpus petitions.*

* See Ford v. Strickland, 734 F.2d 538, 539-40 (11th Cir. 1984), aff'd, 82 L.Ed.2d 911 (1985) (certificate of probable cause granted with respect to second petition which raised new claim based on evidence and legal precedent not available at time of first petition); Bass v. Wainwright, 675 F.2d 1204, 1206-08 (11th Cir. 1982) (full review granted with respect to second petition, to serve the ends of justice, where the denial of the first petition rested on a plain errors of law); Cancino v. Craven, 467 F.2d 1243, 1246 (9th Cir. 1972) (same holding); St. Pierre v. Helgemoe, 545 F.2d 1306, 1308-09 (1st Cir. 1976) (full review accorded second petition where development of new law occurred after denial of first petition); Alford v. North Carolina, 405 F.2d 340, 342-43 (4th Cir. 1968), rev'd on other grounds, 400 U.S. 25 (1970) (same holding); United States v. Henderson, 520 F.2d 896, 904 (2d Cir.), cert. denied, 425 U.S. 998 (1975) (full review granted with respect to second petition where determinative issues of fact raised in first petition apparently were ignored); see also Hobbs v. Pepersack, 301 F.2d 875, 879-880 (4th Cir. 1962) (full review granted where the prisoner in his previous seven petitions had sought but never obtained an adjudication of the merits of his claims).

The case of U.S. ex rel. Schnitzler v. Follette, 406 F.2d 319 (2d Cir.), cert. denied, 395 U.S. 927 (1969), discussed in Petitioner's Brief at 18, is distinguishable from the above cases and from this case in two respects: first, in Schnitzler, there was no special circumstance, such as an intervening change of law or the issuance of a controlling Supreme Court opinion clarifying an unclear body of precedent, which occurred between the denial of the first petition and the filing of the second petition; and second, as the Court of Appeals for the Second Circuit pointed out in Schnitzler, "[b]y entertaining [the second habeas corpus application] the district court improperly functioned as a court of review over a judgment of its superior Court of Appeals." 406 F.2d at 322.

There is no basis in "principles of deference to state court determinations and finality of judgments" (Petitioner's Brief at 13) warranting review of the Court of Appeals determination. Less than a year ago, this Court addressed "the extent of a federal court's powers in ruling upon an issue raised in a successive petition for a writ of habeas corpus" (Id. at 13) in the case of Reed v. Ross, 52 U.S.L.W. 4905 (June 27, 1984). While Reed concerned the application of the "cause and prejudice" requirement to a successive petition that raised a new ground for relief, the competing concerns at issue there were identical to those that petitioner raises in its request for a writ of certiorari:

> On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners. . . . On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments. . . .

52 U.S.L.W. at 4908 (citations omitted). Reed made clear that the priorities embodied in the writ of habeas corpus and reaffirmed in Sanders are still intact:

> It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so worded when the cases were in state court that no one would have recognized them. This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.

52 U.S.L.W. at 4909. Accordingly, a reconsideration of those priorities clearly is not warranted.

Indeed, a judicial reordering of those priorities to restrict federal review of non-abusive successive habeas corpus petitions would subvert Congress's intent in enacting 28 U.S.C. § 2244(b) and Rule 9(b). This Court's interpretation in Sanders of the federal courts' discretion and duty to review the merits of successive petitions was at least partially

informed by Congress's rejection of a bill which would have made principles of res judicata generally applicable to federal habeas corpus. See Sanders, supra, 373 U.S. at 11. In light of Congress's intention to maintain the availability of full federal review for successive petitions in 1966 and 1976, this Court should not attempt "drawing such a line of demarcation" (Petitioner's Brief at 19).

B. The Court of Appeals Decided the Issues Raised by Wilson's Application Consistently with the Requirements of 28 U.S.C. § 2254(d).

At the Huntley hearing, the state trial court made one factual finding, that Lee, the state's informant, did not interrogate Wilson. On the basis of this finding, it concluded that Wilson's statements were "spontaneous" and "voluntary." It failed to consider whether either the government's placing Wilson in a cell overlooking the scene of the crime, or his being prompted to change his story by an informer who had been instructed to extract information from him, or the subtle psychological inducements of proximity to and confidence in his fellow cellmate were factors that caused Wilson to talk to Lee in the absence of his counsel. The holding of Henry, however, is that a court must examine all the circumstances to determine whether they amount to the creation by the government of a situation likely to induce the prisoner to make an inculpatory statement in the absence of his counsel. This the state court and the District Court failed to do. The Court of Appeals undertook this inquiry, and held (not found) that the government's actions constituted "deliberate elicitation." 742 F.2d at 748.

The issue raised by Wilson's habeas corpus petition, whether the government "deliberately elicited" incriminating statements in the absence of his counsel under Massiah and

Henry, involves the application of the law as announced by this Court to the undisputed facts. That the habeas corpus application involves a state prisoner, and that there was a factual hearing in the state court, provide no grounds under 28 U.S.C. § 2254(d) for deference on a question of Constitutional law.

In considering the issue of whether Wilson's statements to his cellmate-informant were "deliberately elicited" by the government, the Court of Appeals did not reexamine or dispute the state trial court's factual finding that Lee did not interrogate Wilson. 742 F.2d at 747-748. Rather, it determined that this fact should not be accorded controlling significance with respect to the issue of deliberate elicitation, as had been done in every previous consideration of the merits of Wilson's Sixth Amendment claim. The Court of Appeals reached its holding based on the facts that Lee was placed in Wilson's cell to function as a surreptitious government informant; that Wilson's cell overlooked the scene of his alleged crime and made him uneasy; and that Lee's ongoing verbal intercourse with Wilson served to exaggerate Wilson's already troubled state of mind, all of which were part of the state trial court record and were never in dispute. The Court of Appeals arrived at the mixed determination of law and fact that:

> Since the government intentionally staged the scene that induced Wilson to make the inculpatory statements, it may be held to have deliberately elicited them in violation of Wilson's Sixth Amendment right to counsel.

742 F.2d at 745.

Contary to petitioner's contention (see Petitioner's Brief at 11-13), the holding of the Court of Appeals did not transgress any of the requirements of 28 U.S.C. § 2254(d) and does not imperil the interests that this statutory provision

was designed to advance. In ruling on Wilson's Sixth Amendment claim, the Court of Appeals was entitled to "give different weight to the facts as found by the state court and [to] reach a different conclusion in light of the [applicable] legal standard." Sumner v. Mata, 455 U.S. 591, 598 (1982); see also Cuyler v. Sullivan, 446 U.S. 335 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Neil v. Biggers, 409 U.S. 188 (1972). It did no more than that. It discarded the state trial court's incorrect legal conclusion, to which it owed no debt of deference under 28 U.S.C. § 2254.

Respondent respectfully submits that the decision of the Court of Appeals is consistent with the applicable decisions of this Court and does not conflict with any established principle of law or depart from the accepted and usual course of judicial proceedings.

CONCLUSION

For these reasons, the Court should not issue a writ of certiorari in this case.

Respectfully submitted,

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No. 84-1479

SUPREME COURT OF THE UNITED STATES

HON. ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioner,

- against -

JOSEPH ALLAN WILSON,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Philip S. Weber, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am of counsel to respondent, Joseph Allan Wilson.

2. On May 31, 1985, I served the within Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit on counsel for petitioner, Mario Merola, District Attorney, 215 East 161st Street, Bronx, New York 10451, by mailing a true copy of the same by depositing it in a sealed wrapper, postage prepaid, in a mailbox maintained by the United States Postal Service in the City of New York.

Philip S. Weber
Philip S. Weber

Sworn to before me this
31st day of May 1985

Evelyn Dalmeda
Notary Public

EVELYN DALMEDA
Notary Public, State of New York
No. 31-4764616
Qualified in New York County
Commission Expires March 30, 1986